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In The

Supreme Court of the United States

KATHRYN O'HANIAN,

Petitioner,

v.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ of Certiorari
To the Supreme Court Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Must a jury view the alleged 'harmful matter," rather than hear mere testimonial descriptions of portions of it, in order to comply with the requirement of California Penal Code Section 313(a) of the First Amendment that the matter be "taken as a whole?"

2. Does California Penal Code Section 313(a) deny due process under Fifth Amendment vagueness principles because it fails to adjust its statutory application for minors of widely different ages in assessing the impact the alleged harmful matter has?

3. Must the trial judgment instruct the jury that California Penal Code Section 313(a)'s requirement that harmful matter be judged by its affect on the "average person" means "average adult" in accordance with the teaching of Pinkus v. United States, 436 U.S. 93 (1979), and CALJIC 16.184?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Kathryn O'Hanian, respectfully prays that a Writ of Certiorari issue to review the denial on September 16, 2004 of her petition for certification to the California Court of Appeal by the Appellate Division of the Superior Court, Los Angeles, California, following its refusal to grant a rehearing and publication on September 14, 2004 of its Memorandum Judgment of August 17, 2004.

OPINIONS BELOW

People of the State of California v. Kathryn O'Hanian, Memorandum of Judgment of of the Appellate Division of the Superior Court, State of California, County of Los Angeles Case No. 042724 (August 17, 2004) [See Appendix A]

People of the State of California v. Kathryn O'Hanian, (denying rehearing and publication) of the Appellate Division of the Superior Court, State of California, County of Los Angeles Case No. 042724 (September 14, 2004) [See Appendix B]

People of the State of California v. Kathryn O'Hanian, (denying Certification to the California Court of Appeal) of the Appellate Division of the Superior Court, State of California, County of Los Angeles Case No. 042724 (September 16, 2004) [See Appendix C]

JURISDICTION

The decision of the Appellate Division of the Superior Court, State of California, County of Los Angeles was entered on August 17, 2004. Timely application for certification to the California Court of Appeal was filed and denied on September 16, 2004.

The judgment is final, was issued by the State's highest court in which a judgment could be had, presents a substantial federal question and was not decided on independent and adequate state grounds. See 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment to the United States Constitution states in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fifth Amendment to the United States Constitution states in part: "No person shall . . . be deprived of life, liberty or property, without due process of law. . . . "

The Fourteenth Amendment to the United States Constitution states in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

California Penal Code, Section 313(a) states in part:

" 'Harmful matter' means matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors."

STATEMENT OF THE CASE

Petitioner Kathryn O'Hanian was charged with exhibiting harmful matter to a minor on August 19, 2002 in violation of California Penal Code Section 313.1(a). Jury trial commenced on April 11, 2003, in the Long Beach Superior Court.

On August 19, 2002 David and Domingo Castellanos and Michael Espinach were 13, 14 and 13 years old, respectively. 2RT 16, 429. That day Petitioner was at the Castellanos' home building bunk beds when Michael Espinach phoned to invite them to his home to swim. Mrs. Castellanos, who was present, agreed that her sons could go if Petitioner would drive them and monitor the pool area. 2RT 23-24. Petitioner was known to all as a teacher involved with student council. 2RT 19.

Petitioner drove David and Domingo to her home and got a two-piece swimsuit. 2RT 59. Although there were adult videos and DVD's there (3RT 748-49), she did not bring any to Michael's house. Once there, Domingo and Michael went into the computer room and began watching pornographic cartoons. 2RT 382. Eventually, David and Appellant walked into the room.

David had seen pictures of vaginal, oral and anal sex on the Internet. 2RT 55. Domingo had seen regular pornography on his home computer, gotten e-mails depicting intercourse and clicked onto pornographic sites. 2RT 282. Michael, in addition to possessing cartoon pornography and prostitutes' business cards, had looked at his father's pornographic magazines and viewed pornographic videos his father had left in the VCR when he was 10 or 11. This peaked his interest. 2RT 453-54, 460. The young men knew the names of adult video companies, and Michael, had seen ads for Vivid Video in magazines and heard its advertisements on the radio.2RT 464.

The four went out to the pool where Michael showed Domingo business cards depicting nude prostitutes he had collected while with his family in Las Vegas. 3RT 663. After swimming, Petitioner drove everyone to Jack-in-the-Box for lunch and then entered a nearby Wherehouse at Michael's request to buy a CD. 3RT 666.

Domingo testified that in the Wherehouse they all went to the adult section and Michael chose a DVD. 2RT 385, 387. David testified that he only went to the R&B section while the DVD was selected. 2RT 303-04. Michael testified that he went to the adult section, did not look at titles and saw Petitioner walk from the adult section

with a DVD. 2RT 465-66. Petitioner testified that while she selected an adult DVD for herself and purchased the videotape comedy "Don't Be a Menace" for the three males, they were not at her elbow. 3RT 669.

Back at Michael's house, Domingo removed the DVD from the Wherehouse bag, opened it and Michael put it on his Playstation. 2RT 391. The young men fast-forwarded through the DVD, watching segments of it. 2RT 421-22, 471. They claimed Petitioner was present while the DVD played. Domingo claimed Petitioner made statements while the DVD played (2RT 427), Michael claimed she did not. 2RT 479. Petitioner testified that while the DVD played, she was locked out of the house. 3RT 673. Domingo and David testified that before watching the DVD Michael worried about his mother discovering the DVD had been played, but Petitioner reassured him. 2RT 313. Michael said that this occurred after the DVD played and that David and Domingo were laughing at him. 2RT 479.

Although the police could have obtained a search warrant for Petitioner's house or obtained a register tape from the Wherehouse identifying the DVD, they did not. The court concluded that it was Petitioner's burden to

produce the DVD (3RT 1523) and allowed the young men to describe the portions they viewed despite Petitioner's best evidence objection. 2RT 314, 392. The DVD was never played for the jurors.

The young men all said they scanned the adult DVD for the sex scenes. None expressed any familiarity with the DVD's title, dialogue, music, scoring, editing or other aspects of what they were watching. 2RT 306 495. It is unclear whether what they watched was a simulated depiction of sexual activity.

The Court denied Petitioner's written Motion to Acquit that the evidence was insufficient because the alleged harmful matter was not seen by the jurors and could not be considered "as a whole" as required under Penal Code Sections 313 and 313.1. 2RT 502.

Petitioner submitted jury instructions of which the Court refused all but two. The Court specifically refused to define Penal Code Section 313 terms "contemporary community standards", "average adult", and "taken as a whole" and "prurient" for the jury and proclaimed that if the jury wanted definitions they could ask for them. The jury never did. 3RT 690-95, 701-04.

On April 17, 2003, the jury returned a guilty verdict. 3RT 1204. Post-trial Petitioner submitted a Motion for Judgment of Acquittal, or Alternatively for a New Trial. 3RT 1522. At the hearing on this motion the Court rejected the Due Process and insufficiency of evidence arguments and the challenge to the jury instructions omitted by the Court. 3RT 1522-27. The federal questions addressed herein were renewed and denied again at that time.

On May 8, 2003 the Court sentenced Petitioner to serve 180 days in the County Jail, 52 weeks of psychiatric counseling and three years probation. 3RT 1534-35. Appellant filed a Notice of Appeal in the courtroom and requested bail. 3RT 1536. The Court denied bail. 3RT 1537. Appellant that day filed an Application for Bail Pending Appeal in the Appellate Division of the Superior Court. The Appellate Division then ordered the trial Court to set bail which is mandatory in misdemeanor cases. It did in the amount of $50,000.

Ultimately, the Appellate Department of the Superior Court heard the appeal and denied it. It also refused a request to publish its opinion and subsequently refused to certify the case to the Court of Appeal.

ARGUMENT

1. A JURY MUST VIEW THE ALLEGED "HARMFUL MATTER" RATHER THAN HEAR MERE TESTIMONIAL DESCRIPTIONS OF PORTIONS OF IT IN ORDER TO COMPLY WITH THE REQUIREMENT OF THE FIRST AMENDMENT AND CALIFORNIA PENAL CODE SECTION 313(a) THAT THE MATTER BE "TAKEN AS A WHOLE."

The Memorandum Judgment concludes a jury need not view the alleged "harmful matter" but can rely instead on testimonial descriptions of snippets of the questioned DVD in order to satisfy the requirement of Penal Code Section 313(a) that the matter be taken as a whole. Specifically, the Judgment states, "Although the jury never saw the actual movie, the boys' testimony was sufficient to allow the jury to infer that the movie, as a whole, depicted explicit acts of sexual intercourse and sodomy, which the jury could certainly determine lacked any 'serious literary, artistic, political, or scientific value for minors'." App.10. This conclusion,, which only discusses the third prong of the test, is flawed for a number of reasons under First Amendment analysis.

Although the DVD may have been sexually explicit, no inference may be drawn that that fact is sufficient to establish proof of the first two prongs of the "harmful matter" test. These require that the material in question, taken as a whole be proved beyond a reasonable doubt to have a prurient appeal to the average adult and not be patently offensive to the average adult. These are the first two prongs of the obscenity formulation required by *Miller v. California,* 413 U.S. 15, 24 (9173). Moreover, the questioned DVD must be presumed to be non-obscene *Roaden v. Kentucky*, 413 U.S. 496 (1973), and correspondingly be presumed non-harmful. Since sexually explicit videos and DVDs are more frequently rented than other DVDs and videos and are shown on demand in almost every hotel room, it is obvious that the average person does not find them either prurient or patently offensive. That is the question which must be addressed, not whether they "depicted explicit acts of sexual intercourse and sodomy."

Films or magazines "are the best evidence of what they represent" and expert testimony is generally not required. *Paris Adult Theatre v. Slaton,* 413 U.S. 49, 56 (1973). *Kaplan v. California,* 413 U.S. 115, 121 (1973), held that there is no "constitutional need for 'expert'

testimony on behalf of the prosecution, or for any other ancillary evidence of obscenity, once the allegedly obscene material itself is placed in evidence." (emphasis added) Implicit in these holdings is the requirement that the allegedly obscene or harmful matter must itself be produced for the jury so that it may be "taken as a whole". There are no cases suggesting that anything less than this is permissible. Since at least the decision in *Roth v. United States*, 354 U.S. 476 (1957), the requirement that the material be "taken as a whole" has been the law. Indeed, this Court has held that even the seizure of sexually explicit material without a prior determination of probable obscenity by a magistrate who focused searchingly on the question after receipt of a description of the entire work at issue constitutes an unconstitutional prior restraint. *Fort Wayne Books v. Indiana,* 489 U.S. 46 (1989), *Lee Art Theatre v. Virginia* 392 U.S. 636 (1968).

The jury may not "infer" from the boys' testimony about parts of the DVD that the DVD, "taken as a whole," constituted "harmful matter." Remembering the requirement of *Roaden, supra,* that unseen portions of the DVD must be presumed non-obscene or non-harmful, such an inference about the whole is unsupportable. Moreover, such an inference could not constitute proof beyond a

reasonable doubt that in its entirety the DVD constituted "harmful matter." That is particularly true because there was no testimony relating to themes, dialogue or messages contained on the DVD. In fact, the DVD could have offered messages about safe sexual practices. One cannot infer proof beyond a reasonable doubt from an absence of evidence.

In sum, neither obscenity nor harmful matter may be proved beyond a reasonable doubt in a criminal trial unless the questioned matter has been itself placed before the trier of fact. To rule otherwise is inconsistent with long established precedent and redefines "taken as a whole" to mean "taken in part.".

2. CALIFORNIA PENAL CODE SECTION 313(a) IS VAGUE AND DENIES FIFTH AMENDMENT DUE PROCESS BECAUSE IT FAILS TO ADJUST ITS STATUTORY APPLICATION FOR MINORS OF WIDELY DIFFERENT AGES IN ASSESSING THE IMPACT THE ALLEGED HARMFUL MATTER HAS.

The Memorandum Judgment states, "The fact that the statute does not adjust its definition depending on the age of the minor does not make the statute unconstitutionally vague." App. 14.

The Judgment does not discuss the contrary conclusion of the Third Circuit in *Ashcroft v. ACLU* 322 F.3d 240, 253-55, (3d Cir. 2003) aff'd on different grounds, 542 U.S. ____, (2004) which was cited by Petitioner. The Third Circuit faulted the government's attempt to rewrite the similar federal "harmful matter" statute in its brief by describing "minors" to mean only normal, older adolescents. It said: "The terms 'minor' as Congress has drafted it [and California as well], thus applies in a literal sense to an infant, a five-year old, or a person just shy of seventeen." Id. at 254. Here the prosecutor argued whether a minor is five or twelve it is all the same. 3RT 968. (As an aside, supposing a two-year old had seen the segments of the DVD in question here, would that child's testimonial description of the DVD be sufficient for the jury to conclude competently that "taken as a whole" the DVD constituted harmful matter? Obviously not). The Third Circuit concluded that even with the government's proposed narrowing instruction the statute "is not tailored narrowly enough to satisfy the First Amendment's requirements." Id. at 255.

This issue decided by the Third Circuit is an important one which has not been raised in California prior

to this case in a vagueness challenge to Penal Code Section 313(a).

3. THE TRIAL JUDGE MUST INSTRUCT THE JURY THAT CALIFORNIA PENAL CODE SECTION 313(a)'s REQUIREMENT THAT HARMFUL MATTER BE JUDGED BY ITS AFFECT ON THE "AVERAGE PERSON" MEANS "AVERAGE ADULT" IN ACCORDANCE WITH THE TEACHING OF PINKUS v. UNITED STATES, 436 U.S. 293 (1979), AND CALJIC 16.184.

The Memorandum Judgment accurately sets forth Defendant's position, namely, "Defendant relies upon Pinkus v. United States (1978) 436 U.S. 298, which held affirmatively instructing the jury to consider children as part of 'average person' was error, to argue that failing to instruct the jury that children are not to be considered in this analysis is also reversible error." App. 16. Then the Judgment states, "We disagree, and defendant cites no authority that failure to instruct in such an instance constitutes reversible error." App. 16. Evidently, the Court could find no authority supporting its assessment. However, CALJIC 16.184, a state approved book of jury instructions cited to the trial court by Petitioner, defines "average person" as meaning "average adult". Pinkus held that the community includes all adults who comprise it and

"it was error to instruct the jury that [children] were part of the relevant community." Failure to instruct the jury to consider only "adults" leaves open for the jury's speculation whether "person" included "children". Moreover, since it is self-evident that "children" are "persons", a competent jury would include "children" as part of the community and thereby violate the teaching of Pinkus.

This is apparently the first decision since Pinkus to determine that failure to define "average person" to exclude children is permissible. It is of overwhelming importance in the area of obscenity and harmful matter law since it allows a jury to reduce the level of what is acceptable First Amendment material to a lower average by including children as part of the computation. The lower trial courts of California must not be allowed to turn the ruling in Pinkus on its head.

CONCLUSION

It is important that clarification be provided to judges who face the issues framed herein in "harmful matter" cases. It is likewise important that both prosecutors

and defense counsel be given the benefit of some guidance in evaluating evidence and its manner of presentation in these situations. Accordingly, the Petition For Writ of Certiorari should be granted.

DATED: December 8, 2004. Respectfully submitted,

LAW OFFICE OF
W. MICHAEL MAYOCK

W. MICHAEL MAYOCK
Attorney for Petitioner
KATHRYN O'HANIAN

APPENDIX A

APPELLATE DIVISION OF THE SUPERIOR COURT
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

THE PEOPLE OF THE STATE CALIFORNIA,	) No. BR 042724
Plaintiff and Respondent,	) Long Beach Trial) Court
v.	) No. 2LM08630
KATHRYN O'HANIAN,	) MEMORANDUM) OF JUDGMENT
Defendant and Appellant.	) (Filed Aug. 17, 2004)

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Following a jury trial, defendant and appellant Kathryn O'Hanian (defendant) was convicted of violating Penal Code section 313.1, subdivision (a), exhibition of harmful matter to a minor. [1] The trial court sentenced defendant to 180 days in county jail and three years summary probation. As part of the terms of probation, she was ordered to attend 52 weeks of psychological

counseling. Defendant timely appeals the judgment of conviction.[2]

Facts

In accordance with established appellate procedure, the evidence is summarized in the light most favorable to the verdict. (People v. Perez (2000) 82 Cal.App.4th 760, 763.)

Defendant was a teacher at Saint John of God School. In addition to her classroom duties, she acted as the student counsel moderator. In June and July 2002, defendant went almost daily to the home of David C., who was then vice-president of the student counsel, and his brother, Domingo, who had just graduated from the school and was previously on the student council. At the time, David was 13 years old and Domingo was 14 years old.

On August 19, 2002, defendant was helping build bunk beds at David and Domingo's home when their friend, Michael, invited the boys to his house to swim. Michael was 13 years old and had graduated with

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All further statutory references are to the Penal Code.

On May 9, 2003, this court granted defendant's application for bail pending appeal and denied her application for stay of execution of judgment pending appeal. The trial court was ordered to set bail pursuant to section 1272, subdivision (2).

Domingo. Defendant assured David and Domingo's mother that she could supervise the boys at Michael's house, so David and Domingo accompanied defendant to her house so she could get her swimsuit, and the three of them proceeded to Michael's house.

At Michael's house, the boys swam, and Domingo and Michael played video games in the living room. Domingo and Michael went to the computer room, and defendant and David followed them in soon thereafter. David saw Michael and Domingo looking at cartoon pornography on the computer. David described the characters as having "dirty sex," specifically "[t]he penis going to the anus or the man licking or the cartoon licking the other cartoon's vagina or the one cartoon sucking the other cartoon's penis." Defendant said, "Is this all you guys look at? I can show you more." Domingo heard defendant say she "could show [them] the real thing." Michael also heard defendant say she could show them "the real thing."

At some point, David suggested that they go eat lunch at Jack-in-the-Box. While eating, Michael said he wanted to go look at music compact discs (CDs). They went to a record store, and David went to the "hip-hop and R&B section." He saw Domingo and Michael in the "rock

section" and defendant in the "porn section." According to Domingo, defendant told Michael and him to pick out a pornographic movie. Defendant, Michael and Domingo were in the "porn section" together. For about 10 to 15 minutes, they were looking at pornographic digital video disc (DVD) covers. Domingo thought that Michael picked out the DVD they later watched. He recalled Defendant saying that "[t]his is the one, it actually had a little sign on it." Domingo testified, "We just chose it and like again it had the little sign thing that said it was like more hard core or something." (Sic.) Defendant purchased the pornographic DVD,[3] along with a CD and another video.

Defendant and the three boys went back to Michael's house. Defendant brought the pornographic DVD into the house. Domingo and Michael played video games for about 10 minutes, then defendant suggested that they watch the DVD. Domingo took it out of the bag and handed it to Michael. Michael was fearful that his Playstation 2 video game system, which he also used to

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[3] All references to the movie and scenes depicted therein are to the pornographic DVD.

play DVDs, would make a record of what he watched and that his mother could then find out about it. After reassurance from defendant, who said she also had a Playstation 2, Michael put the DVD into his Playstation and played the movie. Defendant watched it with the boys, and according to Domingo, she commented "that a certain person in the movie had a large penis."

David described three distinct scenes from the movie. The first scene involved a woman walking into a bedroom, who then began kissing a man. After they watched this scene for approximately five minutes, they skipped forward to a different scene. Later, they watched the rest of this scene, in which a man and a woman disrobed and engaged in vaginal intercourse. The second scene began with two nude women in a bar, kissing and fondling each other on a motorcycle. Then, one man arrived and proceeded to have anal sex with one woman, and another man "pulled his pants down and started to ejaculate." The third scene involved an orgy with "punk rockers," in which one man wore "a dildo strapped around his neck" and a woman 'was going up and down" with the dildo in her vagina.

Domingo testified that the DVD was "like episodes, like different videos." (Sic.) He described the same three scenes as David, and recalled a fourth scene that included two men and women. In that scene, one man received oral sex from a woman while the other man had anal intercourse with her. Michael recounted the same scenes as David and Domingo. He added that one of the scenes, the male ejaculated one the female's stomach. After watching about 30 minutes of the DVD, Michael turned it off during a scene in which a man and a woman were in an office and the female began to strip off her clothes. He was starting "to feel really guilty about it." He took the DVD out of his Playstation 2 and gave it back to defendant. Later that day, defendant drove David and Domingo back home. She told Domingo not to tell his parents that the boys saw the DVD.

In October 2002, Michael's mother commented to Michael about the amount of time defendant was spending with the students, and inquired about what defendant was doing with them. Michael felt guilty about watching the DVD and told his mother about how the boys had watched it with defendant. Michael's mother told him to call Domingo and David, because she intended on telling their

mother about the incident. Shortly after receiving Michael's call, Domingo and David told their parents. The school principal was alerted, and on October 31, 2002, the school put defendant on a leave of absence pending an investigation.

David testified that defendant called him that night, and asked him to lie about how the boys contained the pornographic DVD. Following defendant's telephone call, he "was waking up during the night, shaking a couple of time." He testified, "I felt cold. Just from my waist down would be shaking. My hands would be all shaky and sweaty, but I was cold." (Sic.) Before falling asleep, he "grabbed [his] stuffed animal [and] hugged it, . . ." On the following nights, he had difficulty sleeping. When in bed, he felt "like someone was in the house" and that a door was being repeatedly opened and closed. He following his father's advice to "do the sign of the cross and pray to God," . . . He would again grab his stuffed animal before falling asleep.

On November 15, 2002, David received an e-mail from defendant.[4] He did not reply to it because his parents had told him not to speak to defendant. On December 10, 2002, the complaint was filed against defendant.

Contentions on Appeal

Defendant makes the following contentions on appeal: (1) the testimonial evidence about the DVD was insufficient to support the verdict because, without actually watching the DVD, the jury was unable to consider whether the DVD "as a whole" constituted "harmful matter" as defined in section 313, subdivision (a);(2) section 313 and 313.1 are unconstitutionally vague and overbroad; (3) the evidence was insufficient to prove that the material caused actual harm to the minors; and (4) the jury instructions were prejudicially inadequate.

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[4] The e-mail read in part as follows (spelling and grammatical errors in the original): "hey david, I know you cant talk to me. . . and I understand that. . .but at least you can just say hi once in a while…I don't blame you guys for nothing…so the past is the past and the future is well in the distance…I really don't want to talk about what has happened and ya know…I don't even know what happened…so all I can say is WTF…neway…just say hi once in a while…I have a new sn so you can secretly come on and say hi without neone knowing its me…"

Discussion

1. *There was Sufficient Evidence Support the Conviction*

Defendant contends there was insufficient evidence to support the conviction of violating section 313.1, subdivision (a), because the DVD at issue was never played for the jury. Therefore, according to defendant, the jury could not evaluate the DVD as a whole based on the fragmentary recollection of David, Domingo, and Michael.

The crime of exhibiting harmful matter to a minor is defined in section 313.1, subdivision (a), as follows: "Every person who, with knowledge that a person is a minor, or who fails to exercise reasonable care in ascertaining the true age of a minor, knowingly sells, rents, distributes, sends, causes to be sent, exhibits, or offers to distribute or exhibit by any means, including, but not limited to, live or recorded telephone messages, any harmful matter to the minor shall be punished as specified in Section 313.4. . ."

Section 313, subdivision (a) defines "harmful matter" as "matter, taken as a whole, which to the average person, applying contemporary statewide standards, appeals to the

prurient witness, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." "Matter" is defined in section 313, subdivision (b), as "any book, magazine, newspaper, video recording, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation. . . "

"In reviewing a challenge to the sufficiency of evidence, the appellate court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. [Citation.] In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment. The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation.} We may not outweigh the evidence or evaluate the credibility of witnesses. [Citation.]" (People v. Green (1997) 51 Cal.App.4th 1433, 1437.) As to the sufficiency of the evidence, our inquiry is limited to whether """"any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."" [Citations.] We view

the evidence in the light most favorable to the judgment below, and we "presume in support of the judgment the existence of every fact the trier could reasonable deduce from the evidence."" [Citations.] (People v. Rich (1988) 45 Cal.3d 1036, 1081-1082, original italics.) "the same standard applies to the review of circumstantial evidence. [Citation]" (People v. Ceja)1993) 4 Cal.4th 1134, 1138-1139.)

We conclude that there was substantial evidence to support the jury's conclusion that defendant violated section 313.1, subdivision (a). There was evidence that she exhibited to the boys parts of a DVD depicting sexually explicit adult activities, which fulfilled each statutory requirement.[5] What was contained on the rest of the DVD is not at issue. (Kois v. Wisconsin (1972) 408 U.S. 229, 231 ["A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication . . ."]; see Rees v. State (Tex.Ct.App.1995)909 S.W.2d 264, 268-269.) Defendant suggests that if the entire DVD had been viewed, the sexually explicit scenes could have been "redeemed"; the unseen portions could have had scientific or artistic value for minors. We do not agree.

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[5] We note that at trial, defendant admitted that the DVD was of "a sexually explicit type."

Although the jury never saw the actuai movie, the boys' testimony was sufficient to allow the jury to infer that the movie, as a whole, depicted explicit acts of sexual intercourse and sodomy, which the jury could certainly determine lacked any "serious literary, artistic, political, or scientific value for minors."[6]

II. *Sections 313 and 313.1 are not Unconstitutionally Vague or Overbroad*

Defendant claims section 313, subdivision (1), is unconstitutionally vague in three ways: first, the general definition of "harmful matter" does not give fair notice and lends itself to erratic application by law enforcement; second, the inclusion of the language "for minors" in just the third prong of section 313, subdivision(a), rather than in all three prongs, does not give fair notice of prescribed conduct; and third, section 313, subdivision (a) does not properly adjust its application deoending on the age of the minor.

Section 313, subdivision (a), and the definition of "harmful matter" therein, is set forth ante in Part I. A statute is unconstitutionally vague if it fails to give a "person of ordinary intelligence a reasonable opportunity to

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[6] Circumstantial evidence is acceptable as a means of proof. (CALJIC No. 2.00.)

know what is prohibited. . ." (Grayned v. City of Rockford (1972) 408 U.S. 104, 108.) The statute must also be unambiguously written so as to avoid arbitrary or discriminatory enforcement. (Ibid.)

Defendant's first assertion that section 313, subdivision (a), does not give fair notice and may lead to arbitrary enforcement is merely a legal conclusion. Nevertheless, we note that "harmful matter," as defined in section 313, subdivision (a), tracks the appropriate test for obscenity set forth in Miller v. California (1973) 413 U.S. 15, 24.[7] (See People v. Hsu 82 Cal.App.4th 976, 992.).

Further, the inclusion of "for minor" in only the third and fourth final prong of the "harmful matter" definition does not invalidate the statute. It is clear that the "for minors" language applies only to the third prong, that is, whether the matter "lacks serious literary, artistic, political, or scientific value for minors." Defendant is

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[7] Miller set forth the following basic guideline for determining obscenity: "(a)whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or

trying to introduce vagueness where none exist. The fact that the statute does not adjust its definition depending on the age of the minor does not make the statute unconstitutionally vague. The term "minor" is specifically defined as "any natural person under 18 years of age." (§313, subd.(g).) In addition, a state has the right to adjust the definition of obscenity for a minor. (Ginsberg v. New York (1968) 390 U.S. 629, 638-641 [holding that statute that prohibited the sale of obscene matter to minors under the age of 17 gave adequate notice because it tracked the court's most recent definition of obscenity].) Defendant argues that what may be "harmful matter" to a six year old may not be to a 17 year old, and thus the statute is vague. The existence of borderline cases where it is difficult to determine whether an act is prohibited is not an acceptable reason to hold that

a penal statute is unconstitutionally vague. (Roth v. U.S. (1957) 354 U.S. 476, 491-492.

As for overbreadth, the extent of defendant's argument is the conclusory statement that sections 313 and 313.1 are overbroad. She failed to demonstrate in any way

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scientific value." (*Miller v. California, supra*, 413 U.S. at p.24.)

that the statute may regulate protected as well as unprotected conduct. Thus, this argument fails.

III. *A Violation of Section 313.1 does not Require Proof of Actual Harm*

Defendant contends that the evidence was insufficient to establish that the minors were harmed by watching the pornographic DVD. She argues that because the minors had "extensive familiarity" with sexually explicit material, they were desensitized to and unharmed by the scenes they watched. This contention rests on a faulty legal premise. The plain language of section 313.1 clearly does not require proof of actual harm to the minor.[8]

IV. *The Jury Instructions were not Prejudicially Inadequate*

Defendant points to four instances of instructional error: first, the failure to define "contemporary statewide standards" as "statewide"; second, the failure to instruct that "average person" means "average adult"; third, the failure to define "prurient"; and fourth, the the failure to instruct that each of the three prongs of the "harmfulness

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[8] We note that David testified to having trouble sleeping, shaking, having sweaty hands, and, while in bed, feeling as if someone was in the house, and that his bedroom door was being opened and closed. Thus, even if section 313.1 did require proof of actual harm, the jury could have reasonably inferred such harm from David's testimony.

test" must be proven, as opposed to just one prong.

In this case, the jury was instructed in terms of section 313.1.[9] The jury was further instructed in terms of section 313: "Harmful matter means matter, taken as a whole, which to the average reasonable person, applying contemporary statewide standards, appeals to the prurient interest, and is a matter which, taken as a whole, lacks serious literary, artistic, political[,] or scientific value for minors."

With respect to defendant's first claim of instructional error, she cites no authority that the court must instruct, even upon request, that "statewide" means "statewide." Defendant asserts that the court should have instructed the jury using CALJIC No. 16.186, which states that the proper "community" in "contemporary community "standard" is the statewide community.

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[9] The instruction was read to the jury as follows: "In order to prove a violation of Penal Code section 313.1, subdivision [a], each if the following elements must be proved: [¶] Number one, defendant must have knowledge that a person is a minor or fails to exercise reasonable care in ascertaining the true age of a minor; [¶] And umber two, defendant must knowingly sell, rent, distribute, send, cause to be sent, exhibit, or offer to distribute or exhibit by any

In Jenkins v. Georgia (1974) 418 U.S. 153, the Court approved jury instructions directing the application of "contemporary community standard" without specifying the relevant "community," stating that "the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community." (Id. at p. 157. Moreover, in this case, the instruction as read to the jury referenced only the term "statewide," thus removing any possible confusion from use of the term "community."[10]

Defendant next claims that the trial court erred by refusing to instruct the jury that "average person" means the "average adult," and does not include children.

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means, including, but not limited to, live or recorded telephone message, any harmful matter to the minor."

[10] Defendant argues that a closing argument, the prosecutor prejudicially implied that each juror could set their own standard. The prosecutor said, "Well, you, as the adult, as the average community, are going to decide whether that material is for those kids. It's your decision. There's nothing left." Even if we were to interpret this statement as defendant does, it is well-settled precedent that a juror sitting in an obscenity case may "draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary standards' would reach in a given case." (*Hamling v. U.S.* (1974) 418 U.S. 87, 105.)

Defendant relies on Pinkus v. U.S. (1978) 436 U.S. 293-298, which held affirmatively instructing the jury to consider children as part of "average person" was error, to argue that failing to instruct the jury that children are not to be considered in this analysis is also reversible error. We disagree, and defendant cites no authority that failure to instruct in such an instance now constitutes reversible error. Even if we were to indulge defendant's logical leap and find error, we have no difficulty concluding that it is not reasonably probable that a result more favorable to defendant would have been reached in absence of the error. (People v. Watson (1956) 46 Cal.2d 818, 836.)

As for defendant's contention that the trial court erred in refusing to define "prurient," we see no error. We note that defendant cites no authority in support of this claim. "Prurient" is defined as "having or expressing lustful ideas or desires. . .tending to excite lust; lascivious; lewd. . ." (Webster's New World Dict. (3d college ed. 1994) p. 1084.) "Prurient" does not have a technical meaning under California law. Rather, it has an ordinary meaning, and its statutory definition does not differ "from the meaning that might be ascribed to [it] in common parlance. [Citation.] (People v. Estrada (1995) 11 Cal.4th 568, 575.) Further, there is nothing in the record on appeal

to indicate that any juror in this case had difficulty with them.

Finally, defendant asserts that the trial court erred by failing to instruct that "each of the three prongs in the harmfulness test must be proved." She claims that without this instruction, the jury possibly could have improperly read the test in the disjunctive. This claim lacks merit. The "harmful matter" instruction makes clear by twice using the word "and" that the jury must examine all three prongs of the test. There is no evidence that the jury misunderstood this instruction.

The judgment is affirmed.

/s/ Fumiko Hachiya Wasserman
Wasserman, J.

We concur

/s/ P.J. Lee
Lee, P.J.

/s/ J. Lager
Lager, J.

APPENDIX B

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. KATHRYN O'HANIAN, Defendant and Appellant.	No. BR04724 Long Beach Trial Court No. 2LM08630 ORDER DENYING REHEARING AND PUBLICATION (Filed Sep. 14, 2004)

The petition of Kathryn O'Hanian for rehearing and publicat having been filed and duly considered by this court, is hereby denied.

/s/ Fumiko Hachiya Wasserman
Wasserman, J.

/s/ P.J. Lee
Lee, P.J.

/s/ J. Lager
Lager, J.

APPENDIX C

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. BR04724
	)	
	)	Long Beach Trial Court
Plaintiff and Respondent,	)	
	)	No. 2LM08630
vi.	)	
	)	ORDER
KATHRYN O'HANIAN,	)	(Filed Sep. 16, 2004)
	)	
Defendant and Appellant.	)	
	)	

The petition of Kathryn O'Hanian for certification, having b filed and duly considered by this court, is hereby denied.

/s/ Fumiko Hachiya Wasserman
Wasserman, J.

/s/ P.J. Lee
Lee, P.J.

/s/ J. Lager
Lager, J.